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IN THE

Supreme Court of the United States

October Term, 1958

No. 359

MIDWEST MOTOR EXPRESS, INC.,
Petitioner

vs.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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The government has suggested in its brief in opposition to the petition for certiorari in this proceeding that the election now afforded the petitioner by Section 99 of the Technical Amendments Act of 1958, P.L. 85-866, 72 Stat. 1606, enacted on September 2, 1958, would render the question presented by this certiorari petition moot if the petitioner should exercise

the election. The government further suggests that petitioner's intent to exercise the election afforded it under Section 99 of the Technical Amendments Act of 1958 is to be inferred from the fact that petitioner did not petition this court for certiorari as to the decision below with respect to the accruability of the government claim award in the taxable year 1952. Neither of these suggestions is well founded.

While Section 99 of the Technical Amendments Act of 1958 does grant to each recipient of an award from the Motor Carrier Claims Commission as a result of the government seizure of its property during the period from August 1, 1944 to September 28, 1945 the right to accrue that award as income in 1944 and 1945, instead of in 1952 as determined by the court below, Section 99 does not determine whether such income is to be taxed as a capital gain under the provisions of Section 117(j) of the Internal Revenue Code of 1939, or, on the other hand, as ordinary income under the 1939 Code. It is precisely this question that the instant petition for certiorari asks this Court to review and determine. As a consequence, even if the election under Section 99 were to be exercised by this petitioner, the question here presented would continue to have the same vital significance as it had prior to the enactment of Section 99 because of the different tax treatment accorded capital gains as distinguished from ordinary income. In no sense, therefore, can the enactment of Section 99 of the Technical Amendments Act of 1958 be regarded as rendering moot the question here raised for review.

Neither petitioner, nor any other carrier who received a similar award, is in any position to make an intelligent decision as to whether or not the election accorded by Section 99 should be exercised until the question of whether or

not the award is to be taxed as capital gain under Section 117(j) of the 1939 Code or as ordinary income under that Code is ultimately and finally decided. The need for a prompt and authoritative decision of the issue by this court becomes apparent when it is noted that Section 99 specifically provides that the carrier must make its election within one year from the enactment of Section 99 and when exercised the election is irrevocable.

Moreover, unless the decision of the court below is reviewed and reversed at this time it would, under the collateral estoppel principle applied in *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 68 S. Ct. 715 (1948), present to the government a defense to petitioner's treatment of the award as capital gain in 1944 and 1945, under Section 99 of the Technical Amendments Act.

CONCLUSION

For the reasons stated in the petition and in this brief the petition for certiorari should be granted.

Respectfully submitted,

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